No 498

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

EMIL J. SONDERLICK,
Plaintiff-Petitioner,

against

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, AND BRIEF IN SUPPORT THEREOF.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner Emil J. Sonderlick respectfully prays for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (the highest court in the State of New York in which a determination could be had herein), to review a judgment of that Court entered on February 18th, 1944, affirming a summary judgment in favor of defendant Hallinan dismissing the complaint on the merits.

On March 24th, 1944, the said Appellate Division denied petitioner permission to appeal to the Court of Appeals

of the State of New York, and the Court of Appeals likewise denied such permission on May 25th, 1944, so that a determination could not be obtained in any state court higher than said Appellate Division. On August 25th, 1944, Mr. Justice Jackson signed an order extending to and including September 25th, 1944, the time of petitioner within which to file his petition for certiorari.

Statement of Matters Involved.

In his complaint, the plaintiff-petitioner sets forth seven causes of action, the first of which is an action for malicious prosecution, the second, third and fourth of which are each an action for malicious abuse of process, the fifth, an action in ejectment, the sixth, an action for trespass, and the seventh, an action for conversion (55-90). The defendant-respondent Hallinan is affected by the third, fifth, sixth and seventh causes of action (68-73, 78-86).

On September 8, 1939, petitioner purchased the real property, which included an apartment house of eight four-room apartments and a two-car brick garage, located at 8716 Britton Avenue in the Borough of Queens, City and State of New York (217) and duly recorded the deed in the office of the Register of Queens County on September 9, 1939 (217-218).

On January 16, 1941, petitioner was wrongfully ousted from possession of his said real property by respondent Hallinan, who seized possession of the said real property under the guise of an illegal and void receivership (218). The order purporting to appoint Hallinan receiver of petitioner's real property (142-156) was obtained in an action entitled *"Juanita Gelly, Plaintiff, against Anna Kalamon, Joseph Kalamon and Theodore A. Dylewski, Defendants"* in the Supreme Court, Queens County (218-219).

Petitioner was never a party in the *Gelly* v. *Kalamon* action. His real property was not involved in the action. Nor was notice of the appointment of the so-called receiver ever given to him as owner of the said real property (219).

Moreover, the purported receivership was contrary to the order of October 2, 1939 (268-273), of the Supreme Court, Queens County, vacating a *lis pendens* filed against the real property in the *Gelly* v. *Kalamon* action (219-220).

The purported receivership was in complete violation of section 121 of the New York Civil Practice Act (220-221), which declares:

> "* * * After a notice of pendency of action has been cancelled, neither the proceedings in the action nor any judgment which may be rendered therein shall affect the real property described in any such cancelled notice."

The purported receivership was founded on an order (142-156) claiming to appoint Hallinan a receiver in the *Gelly* v. *Kalamon* action "pending compliance by the defendants Anna Kalamon and Joseph Kalamon and/or their attorney Emil J. Sonderlick, with the terms of the resettled judgment herein." But the resettled judgment in the *Gelly* v. *Kalamon* action makes no mention of petitioner (274-291). Nor is it binding on petitioner or his said real property (223).

After several requests for summary relief from the illegal confiscation of his property were denied, petitioner was obliged to challenge the validity of the so-called receivership by instituting this plenary action against Hallinan.

In his amended answer (92-93), Hallinan interposed a general denial upon information and belief and thus put

in issue each and every allegation in the complaint, including allegations in the first, second and fourth causes of action wherein he is not named as a defendant.

For his first defense (93-108), Hallinan alleged that the order purporting to appoint him a receiver was and is "a subsisting order of the Supreme Court of the State of New York" (96), that he was acting as "agent" for the Supreme Court, Queens County, that his accounts were duly settled and approved and that he was duly discharged as "receiver" in the *Gelly* v. *Kalamon* action (107-108).

Petitioner's reply (136-141) to the first defense in Hallinan's amended answer put in issue the validity of the order purporting to appoint Hallinan a receiver of petitioner's real property (230).

In the affidavit submitted in opposition to Hallinan's motion for summary judgment, petitioner stated that the foreclosure action commenced by the holder of the first mortgage on the said real property was brought on by Hallinan's deliberate default in the payment of some mortgage interest and real property taxes on the said property (232), and that Hallinan instigated the foreclosure action in an attempt to extricate himself from the illegal and void receivership under the cloak of a judicial extension of the *Gelly* v. *Kalamon* receivership to the foreclosure action (233). These accusations were not denied by Hallinan.

Petitioner's affidavit also attacked the validity of the resettled judgment in the *Gelly* v. *Kalamon* action on the ground that it was founded on a complaint (292-315) which is insufficient in law on its face because it does not comply with section 442-d of the New York Real Property Law (233-235). Nor did Hallinan refute this attack upon the validity of the resettled judgment in the *Gelly* v. *Kalamon* action.

For his second defense (108-134), Hallinan alleged that in an action entitled "*Joseph Kalamon, Plaintiff, against Anna Kalamon and Emil J. Sonderlick, Defendants*" in the Supreme Court, Queens County, an "Interlocutory Judgment" (196-202), dated and entered on February 7, 1941, nullified the deed under and through which petitioner claims title to the said real property (128) and that by a "Final Judgment" (203-213), dated July 7, 1941, and entered on July 11, 1941, the matters and issues in litigation in this action were finally adjudicated, adversely to petitioner, and settled, and that petitioner is thereby barred from prosecuting this action (43).

In his affidavit, petitioner showed that the facts and law did not substantiate the claims and allegations put forth by Hallinan (237-265).

Thus, even if the validity of the "Interlocutory Judgment" and the "Final Judgment" in the *Kalamon* v. *Kalamon* action was not otherwise subject to question or attack, petitioner is concededly the owner of an undivided one-half interest in the said real property (241-247). The "Interlocutory Judgment" provided that (200):

> "* * * any transfer of plaintiff's (Joseph Kalamon's) rights thereby be and the same are (sic) restored to the plaintiff, * * *."

Inasmuch as petitioner's grantor, Anna Kalamon, owned a one-half interest in the said real property from 1933, and she never repudiated the conveyance of her interest to petitioner, a judgment in a suit by Joseph Kalamon could not and did not divest petitioner of the one-half interest he had derived from Mrs. Kalamon (243). An appreciation of this fact—namely, petitioner's continuous ownership of at least a one-half interest in the said real property at all pertinent times—is fundamental to an understanding of the issues on this appeal.

From September 9, 1939, to February 5, 1941, the date of the "Interlocutory Judgment", petitioner was the sole record and beneficial owner of the said real property (242-243). Hallinan, as "receiver", originally entered and trespassed on petitioner's property on January 16, 1941 (243).

Moreover, the validity of the "Interlocutory Judgment" and the "Final Judgment" in the *Kalamon* v. *Kalamon* action was attacked on the ground that they were founded on an amended complaint (181-195) that is insufficient in law on its face (247-248) and are violative of the Constitutions of the United States of America and of the State of New York in relation to the taking of property without due process of law (248-249).

In addition, petitioner averred that Joseph Kalamon had repeatedly stated to him, long after the entry of the so-called judgments in the *Kalamon* v. *Kalamon* action, that he (Kalamon) had no claim against petitioner, that petitioner owed him no money, that he recognized petitioner's title in the said real property, and that he was not even aware that his attorney had impleaded petitioner in the *Kalamon* v. *Kalamon* action (264-265).

Question Presented.

Was the summary dismissal without a trial of petitioner's ejectment action and his other claims, which dismissal was predicated upon affidavits setting forth an alleged prior adjudication in an action to which he was not a party and wherein he was deprived of his property through a void receivership granted without notice to him as owner of the property, due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States?

Reasons for Allowance of Writ.

1. Petitioner, through the decision of the Court below, has been deprived of valuable real property, his title thereto has been ignored and he has been denied the opportunity of ousting those wrongfully in possession.

2. His title to this property has been nullified on the basis of an alleged prior adjudication in an action to which he was not a party, and in disregard of the plain provisions of New York Civil Practice Act, Sec. 121.

3. He has been ousted of his possession through the medium of a void receivership granted without notice to him as owner.

4. He has been deprived of a trial on the merits.

5. All of the foregoing proceedings are grossly violative of his rights under the Fourteenth Amendment, as he has urged from the outset.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme Court of the State of New York, First Department, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Appellate Division had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Appellate Division be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., September 22, 1944.

EMIL J. SONDERLICK, *Petitioner,*

by JACOB W. FRIEDMAN,
Counsel for Petitioner.